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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 955

FRANK VALENTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 285–291) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 22, 1943 (R. 291–292). The petition for a writ of certiorari was filed April 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence of petitioner's association with the conspiracy alleged and proved was sufficient to warrant submission of the question of his guilt to the jury.

2. Whether petitioner was prejudiced by the admission in evidence of certain testimony of the Government witness McGuire on cross-examination.

STATUTE INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On September 25, 1941, petitioner and twenty others were charged in a one-count indictment, filed in the District Court for the Western District of New York, with conspiracy to violate the Internal Revenue laws relating to liquor (R. 1–12, 15).[1] Six of the defendants pleaded guilty at the

[1] The object of the conspiracy, as alleged in the indictment, were as follows: To possess unregistered stills; to engage in the business of a distiller without giving bond,

opening of the trial,[2] and petitioner was tried with eight of the remaining defendants (R. 2).[3] The indictment was dismissed as to one of these, Carl Dimino, at the close of the Government's case (R. 2, 233–234), but petitioner's motion to dismiss the indictment, based principally upon the alleged insufficiency of the evidence and made both at the close of the Government's case and at the conclusion of all the evidence, was denied (R. 232–234).

Four of the defendants were acquitted;[4] petitioner and three others[5] were found guilty (R. 266). After denying petitioner's motions to set aside the verdict and for a new trial, which were based upon all of the grounds and objections previously advanced (R. 266–267), the court sen-

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registering, and posting the required sign, and to defraud the United States of the tax on the spirits distilled; to carry on the business of a rectifier without paying the special tax therefor; and to transport, remove, and conceal distilled spirits upon which no tax had been paid (R. 3–6). Nineteen overt acts were alleged to have been committed in furtherance of this conspiracy (R. 6–12).

[2] Those who pleaded guilty were Frank Dimino, Francis Greco, Rose M. Greco, John Capone, Charles Salli and John De Vito.

[3] Of the other six defendants, the indictment was dismissed as to one, Joseph Conti, Sr., on motion of the Government (R. 2); a severance was granted as to one, Joseph Randazzo, who was serving an indefinite term of imprisonment in a New York State Reformatory; and two, Antonio and Salvatore Valenti, were never apprehended.

[4] Those acquitted were Concetta Morreale, Mary Valenti, Andrew Dimino, and Joseph Conti, Jr. (R. 2).

[5] Joseph, Alphonse A., and Alphonse J. Valenti.

tenced him to serve 16 months' imprisonment and to pay a fine of $1,000 (R. 16, 268). On appeal by petitioner alone, his conviction was affirmed (R. 285–292).

Since petitioner does not attack the sufficiency of the evidence to establish the existence of a conspiracy between some or all of the defendants, the evidence in that connection may very briefly be summarized as follows:

During the period of the alleged conspiracy—January 15, 1935, to and including August 31, 1941—federal officers seized seven illicit stills in the western part of New York State, two in Rochester and five on nearby farms, and four alcohol drops, three in Rochester and one in Buffalo, all of which were being operated by one or more of the defendants. The interlocking combinations of the defendants directly involved in each seizure attested to the syndicate character of the various operations, as well as to the fact that the syndicate was very much a family affair, with members of the Valenti family [6] and Frank Dimino, petitioner's brother-in-law and one of those who pleaded guilty (R. 2, 184), as its ringleaders. (R. 20–28, 32–34, 62, 63–67; R. 28–30, 247;

[6] Antonio, Joseph, Alphonse A., and Salvatore Valenti are all brothers of petitioner (R. 130, 133, 146, 185, 250), Alphonse J. Valenti, his son (R. 133, 185, 250), and Mary Valenti, his wife (R. 146).

R. 31–32, 247–248; R. 34–38, 68–69; R. 248; R. 248; R. 82–85, 248–249; R. 249; R. 249–250; R. 153–157, 192–195, 198, 199, 250; R. 102–106.)[7]

At least twelve cars used by the various defendants at different times were registered in the names of female relatives who never drove the cars, three of the registrants being sisters of petitioner (R. 78, 100–101, 101–102, 132, 135, 187, 188, 217, 218, 221, 248, 249). One of the cars was equipped with extra springs (R. 90–91) and new license plates were obtained on two of the cars and on a truck belonging to the defendant Capone, on affidavit that the old plates had been lost (R. 124–125, 157–159). The cars were all taken to the same place, the Central Chevrolet Company in Rochester, for repairs, and, although they were driven there by the various defendants, the repairs were always charged to the accounts of either Joseph Valenti or Frank Dimino (R. 85–97). One of the cars was seized at the alcohol drop at Buffalo (R. 248), two of them were driven from the alcohol drop at 60 Bellwood Place, Rochester, on two different occasions in 1941 by different defendants (R. 100–102), and one of them was used in Jamestown in 1940 by the defendant DeVita (R. 78). During 1940 these cars were continually parked together, in varying combinations, either at the Valenti homestead (R. 164)

[7] Record references are here arranged to cover each seizure in order of time of occurrence, beginning with September 25, 1935, and ending with April 17, 1941.

at 1113 East Main Street, Rochester, petitioner's residence at 19 Mayberry Street (R. 27), or his adjoining garage at 504 Atlantic Avenue (R. 26–27), at Frank Dimino's service station or home (R. 56–57, 148, 164), or at the Grotese Club in Rochester (R. 106–182). There was also direct evidence of personal association between the various defendants, usually in connection with the use of the syndicate cars either in Rochester or Jamestown (R. 73–74, 100–101, 110–111, 126, 130–131, 133, 136, 138, 139, 142, 143, 144, 146, 149, 150, 151–152, 153, 159–160, 162, 169, 170, 204, 212–213, 248) and of numerous long-distance telephone calls made to and from Frank Dimino's home and service station in Rochester to Buffalo (R. 54–56, 57), where one of the alcohol drops was seized on June 25, 1939 (R. 248), and to DeVita's residence at Jamestown, which had an unpublished phone number (R. 50, 57, 279–282).

The evidence of petitioner's participation in this conspiracy was as follows:

(1) In the early stages of the conspiracy, petitioner was directly involved in the operation of two illicit stills. Federal officers raided a barn on the Vandertweel farm at Irondequoit, New York, at midnight on September 25, 1935, and caught Carl Dimino operating a still. At 1:30 a. m. petitioner, dressed in street clothes covered by overalls, drove up to the still premises in a Buick car which contained coke and 5-gallon cans

similar to those found in the barn. Two days previously the officers had observed the same car, loaded with coke, being driven from petitioner's garage at 504 Atlantic Avenue, Rochester, adjoining his residence at 19 Mayberry Street, to the same still premises. (R. 21–28, 63–67.) In 1937 petitioner operated an illicit still on his garage premises at 504 Atlantic Avenue in a building which was formerly used as a restaurant. When a fire broke out at the place on September 9, 1937, a still was found in the basement of the old restaurant, set up for operation and still warm, together with alcohol and sugar bags. A second, dismantled, still was found in a connecting shed. Petitioner and his wife were convicted of possessing and failing to register the set-up still. (R. 36–38, 46, 67–70, 245.)

(2) In August 1939 petitioner rode in his own car with the defendants Frank Dimino and John DeVita from John DeVita's residence at 117 Allan Street, Jamestown, to downtown Jamestown, where the car, stopped for going through a red light, was found to contain an assortment of small pipe fittings, a hydrometer, and a water pump. The hydrometer was of the type commonly used for testing alcohol and the water pump was similar to one found at a still (R. 73–78, 81–83). Frank Dimino, who was operating the car at the time, pleaded guilty in the instant case and was one of the most obvious participants in the conspiracy

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(see *supra*, pp. 4–6). John DeVita, petitioner's other companion, who also pleaded guilty, had been arrested with the defendant Charles Salli at the alcohol drop at the Chicago Street garage in Buffalo on June 25, 1939, where one of the syndicate cars was seized. (R. 248.)

(3) Like the telephone number for DeVita's residence in Jamestown, petitioner's telephone number was unpublished and was used for a long-distance call from DeVita's residence on July 20, 1940. The unpublished telephone number was also found on a post card in the billfold of James Valenti (unrelated to petitioner, R. 249) when he was arrested during the seizure of one of the syndicate stills on September 8, 1939. (R. 82–83, 247–249, 280–281.)

(4) In 1940 petitioner's Buick sedan—the same one in which petitioner, Frank Dimino, and John DeVita were carrying still equipment in Jamestown in August 1939—was taken to the Central Chevrolet Company of Rochester for repairs, in the same manner as the falsely registered syndicate cars. The repair card was originally made out to Valenti, East Main Street (which would be Joseph Valenti). When the car was returned by the garage, the repairs were paid for in cash and the name "Valenti" was crossed out and "Frank Dimino" substituted. (R. 75, 88–89.)

(5) On November 12, 1940, Joseph Randazzo, an alleged coconspirator, who had been caught at

the Lash Farm still and who had rented the premises for the alcohol drop at 43 Hollister Street, Rochester (R. 249–250), was, on two occasions, seen driving petitioner's new Oldsmobile (R. 165–166). John DeVita, the Jamestown defendant, who pleaded guilty (R. 2), was also seen driving the same car on two different occasions (R. 78–79).

(6) During 1940 petitioner's cars were parked on innumerable occasions with one or more of the syndicate automobiles at the Grotese Club and at the Valenti homestead (R. 108–110, 111, 113, 120, 122, 123, 128, 129–130, 136, 139, 145–147, 162) and one or more of the various syndicate cars or John Capone's truck was constantly parked in front of or near petitioner's residence at 19 Mayberry Street, or in his adjoining garage or driveway at 504 Atlantic Avenue (R. 111–112, 113, 114, 115–116, 117, 118, 119, 120, 123, 124, 125, 128–129, 130, 132, 134, 137, 138–139, 140, 141, 143, 145, 147, 148, 152, 157, 158, 160–161, 162). In addition, there was direct evidence of personal contact between petitioner and other defendant members of the Valenti family, Frank Dimino, DeVita, and Randazzo (R. 73–74, 146, 169, 170, 212–213).

(7) In early 1941, before the alcohol drop at 60 Bellwood Place, Rochester, was seized, Joseph Valenti and Joseph Lo Tempio (not a defendant) were each, at different times, observed driving from the alcohol drop to petitioner's residence.

Joseph Valenti drove in one of the syndicate cars. Joseph Lo Tempio was later caught carrying alcohol in the same car he had driven to petitioner's residence. (R. 102–103.)

(8) Petitioner obviously had no regular occupation. He adduced evidence to show that he bought bankrupt stocks at auctions, but this evidence at best revealed no more than that he made a total of three or four purchases of bankrupt stock, two in 1938 or 1939, one in February 1941, and one in June 1941. (R. 238–239, 240–243.)

Most of the nineteen overt acts alleged as having been committed in furtherance of the conspiracy, including the operation of stills and alcohol drops, were proved by direct evidence (cf. R. 6–12 with *supra*, pp. 4–10, and R. 248–249).

ARGUMENT

1. Petitioner's contention that the evidence was insufficient to show his guilty association with the alleged conspiracy (Pet. 5–8) is plainly lacking in merit.

It is immaterial, as the court below pointed out (R. 288), that no single piece in the chain of circumstantial evidence against petitioner points conclusively to his guilt. The rule which he apparently invokes, but misinterprets, is that, where guilt depends upon circumstantial evidence, the evidence, considered *in toto*, must be inconsistent with the theory of innocence or, as sometimes stated, exclude every reasonable hypothesis ex-

cept that of guilty.[8] This means, we believe, no more than that a jury should not be allowed to speculate as to a defendant's guilt in a case where the circumstantial evidence, considered altogether, does not clearly point toward guilt. The rule, as stated by this Court in a different manner and as applied to the instant case, is that petitioner's conviction must be sustained if, taking the view most favorable to the Government, the evidence reasonably warrants the inference that he was associated with the conspiracy which he concedes the proof established (*Glasser* v. *United States*, 315 U. S. 60, 80; see also, *Abrams* v. *United States*, 250 U. S. 616, 619).[9]

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[8] This is the rule which is stated in four of the five cases upon which petitioner relies, i. e., *Kassin* v. *United States*, 87 F. (2d) 183 (C. C. A. 5); *Copeland* v. *United States*, 90 F. (2d) 78 (C. C. A. 5); *De Luca* v. *United States*, 298 Fed. 412 (C. C. A. 5); *Wright* v. *United States*, 227 Fed. 855 (C. C. A. 8). The other case he cites, *Paddock* v. *United States*, 79 F. (2d) 872 (C. C. A. 9), merely held that an instruction to the jury explaining the meaning of "reasonable doubt" was erroneous. For other cases stating the general rule referred to in the text, see *Hammond* v. *United States*, 127 F. (2d) 752 (App. D. C.); *Weiss* v. *United States*, 122 F. (2d) 675 (C. C. A. 5), certiorari denied, 314 U. S. 687; *United States* v. *Russo*, 123 F. (2d) 420, 423 (C. C. A. 3); *United States* v. *Mann*, 108 F. (2d) 354, 358 (C. C. A. 7); *Neal* v. *United States*, 102 F. (2d) 643, 648 (C. C. A. 8), certiorari denied, 312 U. S. 679; *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Ferris* v. *United States*, 40 F. (2d) 837, 840 (C. C. A. 9); *Kennedy* v. *United States*, 44 F. (2d) 131, 132 (C. C. A. 9).

[9] See also *United States* v. *White*, 124 F. (2d) 181, 185 (C. C. A. 2); *United States* v. *Novick*, 124 F. (2d) 107, 108

The evidence amply supports the inference that petitioner participated in the conspiracy. In 1935 he was caught at the Vandertweel Farm still at Irondequoit, New York, and in 1937 he was convicted of possessing and failing to register a still found on his garage premises at 504 Atlantic Avenue, Rochester. Two stills had been found on the premises, one of which was not being used. And, instead of indicating that petitioner abandoned his illicit operations after his conviction in 1937, the evidence compels the conclusion that he continued his operations on an even broader scale, but more under cover, and possibly as leader of the conspiracy.

Petitioner's constant association with all of the conspirators throughout the period of the con-

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(C. C. A. 2), certiorari denied, 315 U. S. 813; *United States* v. *Gallo*, 123 F. (2d) 229 (C. C. A. 2); *United States* v. *Beck*, 118 F. (2d) 178, 185 (C. C. A. 7), certiorari denied, 313 U. S. 587; *United States* v. *Potash*, 118 F. (2d) 54, 56 (C. C. A. 2), certiorari denied, 313 U. S. 584; *United States* v. *Mortimer*, 118 F. (2d) 266, 268, (C. C. A. 2), certiorari denied, 314 U. S. 616; *United State* v. *Pecorago*, 115 F. (2d) 245 (C. C. A. 2), certiorari denied, 312 U. S. 685; *United States* v. *Pandolfi*, 110 F. (2d) 736, 737 (C. C. A. 2), certiorari denied, 310 U. S. 651;; *United States* v. *Buckner*, 108 F. (2d) 921, 925–926 (C. C. A. 2), certiorari denied, 309 U. S. 669; *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Pernatto* v. *United States*, 104 F. (2d) 427, 428 (C. C. A. 3); *Marino* v. *United States*, 91 F. (2d) 691, 699 (C. C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Smith* v. *United States*, 62 F. (2d) 1061, 1062 (App. D. C.); *Goode* v. *United States*, 58 F. (2d) 105, 107 (C. C. A. 8).

spiracy was shown by direct evidence of his personal contact with some of the conspirators, the activity of the syndicate cars in and about his residence and garage, and constant mingling of his own car with the syndicate cars at other places, and the use of his car by Randazzo and DeVita. Moreover, the evidence clearly shows that the association was not an innocent one. The mere relationship of some of the defendants could hardly explain the extraordinary activity of the various syndicate cars. Rather, the relationship indicates that the conspiracy was a family affair, tending toward the belief that petitioner must have been involved in it, especially since his son and four of his brothers were participants and seven of the syndicate cars were registered in the names of three of his sisters. On different occasions, Joseph Valenti and Joseph Lo Tempio were seen driving directly to petitioner's residence from the alcohol drop at 60 Bellwood Place, Rochester. Petitioner had an unpublished telephone number, as did the Jamestown defendants. The unpublished number was found on a post card in the billfold of James Valenti (unrelated to petitioner) when he was arrested during the seizure of the still at East Eden, New York, on September 8, 1939. Petitioner's Buick was repaired at the Central Chevrolet Company in Rochester in August 1939 in Frank Dimino's name, just as were the falsely registered syndicate cars and John

Capone's truck. Petitioner had no regular occupation. With these facts as a background, it is practically impossible to explain away the fact that petitioner, accompanied by two of the confessed conspirators, Frank Dimino and John DeVita, used his car in Jamestown in August 1939 to carry still equipment (*supra*, pp. 7–8). These circumstances not only justify but compel the conclusion that petitioner was associated in the conspiracy. No sufficient reason appears why the concurrence of the district judge, the jury and the circuit court of appeals as to the sufficiency of the evidence should not be accepted as final. *Delaney* v. *United States*, 263 U. S. 586, 589–590.

2. After testifying on direct examination that he arrested Alphonse A. and Alphonse J. Valenti at the alcohol drop at 43 Hollister Street, Rochester, in the early morning on September 8, 1940 (R. 192–194), Government witness T. J. McGuire, an investigator of the Alcohol Tax Unit (R. 189), was asked on cross-examination by counsel for the other defendants (R. 19, 204) whether he had stated all of the conversation he had with the two boys that morning. He replied, "There is only one other item that I remember now that I haven't spoken here and that is—do you want that?" Counsel said, "Yes," and McGuire answered, "I looked at these youngsters and I said, 'Is this a nice place for you two kids to be? I would give a thousand dollars to have your father where you are. I do not get any fun

out of arresting 19-year-old boys' " (R. 207). Petitioner's counsel objected (R. 207) and petitioner now urges (Pet. 8–10) that he was prejudiced by the refusal of the trial court to exclude the statement (R. 283–284).

The statement was competent evidence unless it was immaterial and irrelevant [10] and, if it was immaterial and irrelevant, it obviously did not prejudice petitioner. Moreover, it did no more than reveal the possibility that McGuire was prejudiced against petitioner and it was this very fact which petitioner sought to bring out in his subsequent examination of McGuire, no doubt with the view of discrediting his entire testimony. McGuire was asked if he did not tell Mr. Rose of the Central Chevrolet Company that he was "going to throw all of the Valentis in jail" (R. 208), and then, when he denied making such a statement, was reproached thus, "You just told us a minute ago that you told the boys over at Hollister Street that you would rather have the father than the two boys" (R. 208–209). After McGuire admitted, "I did make that statement," counsel for the Government interjected, "What has that to do with it?" Counsel for petitioner replied, "If you have an objection why don't you make it?", thereby plainly showing that he considered the testimony advantageous to petitioner and shifting to the Govern-

[10] The testimony was not hearsay for McGuire was relating a conversation he had with one of the defendants.

ment the burden of objecting to it (R. 209). Thereafter, petitioner's counsel designedly attempted to elicit from McGuire an admission that he had also made the statement to petitioner (R. 210–212). The record therefore clearly disproves petitioner's innuendo (Pet. 10) that in his cross-examination he was "attempting to disprove the matters testified to or * * * seeking to prove facts inconsistent with them" and, instead, reveals that petitioner sought to use the statement to develop a showing of McGuire's bias toward him, thereby reflecting upon the credibility of McGuire's testimony on direct examination. Consequently, the statement did not prejudice petitioner and his original objection to it was waived by his adoption of it as evidence in his favor.

CONCLUSION

The case was correctly decided below and involves no conflict of decisions or important question of law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1943

U. S. GOVERNMENT PRINTING OFFICE: 1943